

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>LAWRENCE H. HUGGINS</b>	:	ORDER
	:	DTA NO. 816547
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period Ended April 5, 1992.	:	

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Petitioner, Lawrence H. Huggins, 80 East 93<sup>rd</sup> Street, Apt. B-915, Brooklyn, New York 11212, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period ended April 5, 1992.

On July 17, 1998 the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). The parties had 30 days to respond to the notice. The Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), submitted the affidavits of Thomas J. English and James Baisley with attachments, in response to the motion. Petitioner appearing *pro se*, submitted a letter in response to the notice which was received on August 14, 1998, which date began the 90-day period for the issuance of this order.

Upon review of the pleadings, the Notice of Intent to Dismiss Petition, and the affidavits and other documents submitted in response to the notice, Roberta Moseley Nero, Administrative Law Judge, renders the following order.

### ***ISSUE***

Whether petitioner timely filed his petition with the Division of Tax Appeals following the insurance of a conciliation order.

### ***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued a Notice of Determination to petitioner dated November 7, 1994. The notice was for sales and use taxes due for the period ended April 5, 1992. As of the date of the issuance of the notice, the total balance due, including tax, penalty and interest, was \$4,098.09. The explanation set forth in the notice indicates that petitioner failed to file a “Report of Casual Sale” for the purchase of a race horse, and since petitioner did not respond to the Division’s inquiry regarding the transaction, the taxes due were estimated.

2. Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) and a conference was held on September 6, 1995. BCMS, by conciliation order dated December 15, 1995, denied petitioner’s request and sustained the statutory notice issued to petitioner.

3. On June 8, 1998 the Division of Tax Appeals received the petition of Lawrence H. Huggins seeking a revision of the determination that was sustained by the conciliation order. The envelope containing the petition bore a United States Postal Service postmark of June 4, 1998.

4. On July 17, 1998, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition which explained that petitioner had 90 days from the date the conciliation order was issued to file a petition, and it appeared the petition was filed on June 4, 1998, or 902 days after the conciliation order was issued.

5. The Division submitted affidavits from the following employees, with attachments, in response to the Notice of Intent to Dismiss Petition: Thomas J. English, Assistant Supervisor of

Tax Conferences in BCMS since October of 1987, whose duties include being familiar with the procedures and operations of BCMS including the preparation and mailing of conciliation orders, and James Baisley, Chief Processing Clerk, Mail Processing Center of the Division since 1994, who is familiar with the operations and procedures of the Mail Processing Center and whose duties include supervising the delivery of outgoing mail to the post office. These affidavits describe the general procedures for the preparation and mailing of conciliation orders and how such procedures were followed in this case.

6. Mr. English, in his affidavit, explains that conciliation orders are sent by certified mail. Conciliation orders issued on a given day, together with a certified mail record ("CMR"), are prepared by the word processing unit of BCMS. A CMR lists all taxpayers to whom an order is to be mailed on a given day. Completed CMRs are kept by BCMS. The CMR has columns for the certified number, name and address of the addressee, postage and fee amounts, and remarks. At the bottom of each page of a CMR are blank spaces for the total number of pieces of mail the sender has listed, the total of pieces of mail received at the post office and a space for the name of the receiving employee at the post office. The word processing unit forwards the conciliation orders for the day, together with the CMR, to a clerk within BCMS who processes these papers.

The clerk:

verifies the names and addresses of taxpayers who are listed on the CMR. A certified control number is assigned to each Conciliation Order listed on the CMR. The clerk then affixes the sequential certified control number stickers to envelopes for each listed taxpayer or representative. The clerk then records on the CMR, under the heading 'Certified No.', the certified control number from each envelope next to the appropriate name. (English affidavit, ¶ 6.)

7. An employee of the Mail Processing Center of the Division then picks up the orders and the CMR. Mr. Baisley's affidavit explains what happens after the orders and the CMR are

placed in the “Outgoing Certified Mail” basket in the Mail Processing Center. First, “a member of the staff weighs and seals each envelope and places ‘postage’ and ‘fee’ amounts to the letters.” (Baisley affidavit, ¶ 4.) Then a clerk counts the envelopes and checks the names and certified mail numbers to ensure that they are the same on the envelopes and the CMR. An employee of the Mail Processing Center then delivers the envelopes and the CMR to the Colonie Center Branch of the United States Postal Service in Albany. The CMR is the Division’s receipt for the certified mail delivered. The CMR is usually picked up from the post office the following day by an employee of the Mail Processing Center and returned to BCMS.

8. In support of its position that the procedures outlined above were followed in this case, the Division has submitted a copy of the CMR for December 15, 1995. The CMR consists of three pages. On each page of the CMR the caption lists BCMS as the sender, and indicates that it is a record of mailing and fees for conciliation orders mailed on December 15, 1995. On page two of the CMR petitioner’s name and address are listed next to the certified number Z181287333. At the bottom of page two of the CMR, 14 pieces of mail are indicated as both being listed by the sender and received at the post office.<sup>1</sup> Fourteen certified control numbers are listed on page two of the CMR sequentially from Z181287329 to Z181287342. There is a signature in the space for the name of the receiving postal employee. There is a United States Postal Service postmark of December 15, 1995 on the bottom of the page.

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<sup>1</sup>The names and addresses of the other taxpayers have been redacted to protect their confidentiality.

Petitioner's address is listed on the CMR as "80 East 93<sup>rd</sup> Street, Apt. #B915, Brooklyn, NY 11212-2354." This matches the address set forth on the notice of determination issued by the Division and the address set forth by petitioner in his petition.<sup>2</sup>

9. In his letter submitted in response to the Notice of Intent to Dismiss Petition, petitioner asserts that he had never received written notice of the conciliation order and therefore was unaware of the 90-day time period to file his petition. Petitioner requests that the Notice of Intent to Dismiss Petition be revoked and that the petition be considered valid.

### ***CONCLUSIONS OF LAW***

A. Pursuant to Tax Law § 1138(a)(1)<sup>3</sup>, petitioner had 90 days from the mailing of the Notice of Determination to file a petition with the Division of Tax Appeals. Petitioner also had the option, pursuant to Tax Law § 170(3-a)(a), to file a request for a conciliation conference with BCMS. Petitioner chose the latter option in this case, and a conciliation order dated December 15, 1995 sustaining the statutory notice was issued.

Pursuant to Tax Law § 170(3-a)(b) and (e) petitioner then had 90 days to file a petition with the Division of Tax Appeals. Counting 90 days from December 15, 1995, petitioner had until March 14, 1996 to file his petition. The petition was received on June 8, 1998 and the envelope containing the petition bore a United States Postal Service postmark of June 4, 1998. A petition delivered after the due date by the United States Postal Service will be deemed to be filed on the date of the postmark. (20 NYCRR 3000.22[a].) Therefore, the petition filed in this matter is deemed filed on June 4, 1998 which is over two years past the March 14, 1996 due

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<sup>2</sup>However, the address listed by petitioner on his petition did not include the final four digits of the zip code.

<sup>3</sup>Tax Law § 1138(a)(1) has been amended since the years in question. Such amendments did not affect the 90-day time requirement.

date. Since it appeared upon receipt of the petition that it was filed late, a Notice of Intent to Dismiss Petition was issued pursuant to 20 NYCRR 3000.9(a)(4).

B. Where the timeliness of either a petition filed with the Division of Tax Appeals or a request for conciliation conference with BCMS is at issue, it is incumbent upon the Division to demonstrate that the notice at issue, in this case the conciliation order, was properly mailed and when it was mailed. (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991.) This requires that the Division submit evidence sufficient to prove that it has established general mailing procedures and that those procedures were followed in this instance (*Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97; *Matter of Katz, supra*; *Matter of Novar TV & Air Conditioner Sales & Serv., supra*). If the Division is able to meet its burden to prove that it has general mailing procedures and that the procedures were followed, a presumption of receipt by the taxpayer arises (Tax Law § 1147[a][1]; *Matter of T.J. Gulf v. New York State Tax Commn., supra*). If the Division is unable to meet this burden, the statutory time limit to file a petition is in effect tolled and the petition will be deemed timely filed (*Matter of Katz, supra*; *Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995).

C. The English and Baisley affidavits establish the general mailing procedures for mailing of conciliation orders. Conciliation orders to be mailed on a given day, together with the CMR listing such orders, are produced by the word processing unit of BCMS. The orders and the CMR are then forwarded to a BCMS clerk who processes these papers as part of his or her regular duties. The clerk verifies the names and addresses of the taxpayers listed on the CMR. Then the clerk assigns a certified control number to each order listed on the CMR,

places the certified number sticker for that number on the envelope and writes the certified number on the CMR next to the name and address of the person whose envelope lists that number. Next, the Mail Processing Center picks up the CMR and the orders. Once these documents are in the “Outgoing Mail” basket in the Mail Processing Center, they are weighed, sealed, and the proper amount of postage and fees recorded on the CMR. Then an employee of the Mail Processing Center counts the envelopes and checks the information on the envelopes against that on the CMR. The orders and the CMR are then delivered to the post office. The next day someone from the Mail Processing Center picks up the CMR, which is the Division’s receipt of certified mail, and returns it to BCMS. Completed CMRs are kept in the normal course of business by BCMS.

D. The CMR submitted with Mr. English’s affidavit illustrates that those procedures were followed in this case. Petitioner’s name as listed on the CMR matches his name as it appears on the conciliation order. The address listed on the CMR matches both that utilized by the Division in the notice of determination and by petitioner in his petition. The date of the Postal Service postmark on the CMR indicates that the conciliation order was mailed on December 15, 1995. The CMR indicates that there were 14 pieces of mail both listed by the sender, and received by the post office. This is corroborated by the signature of the receiving postal employee and also by the fact that 14 certified control numbers are listed on page one of the CMR sequentially from Z181287329 to Z181287342.

E. The Tax Appeals Tribunal has held that evidence of general mailing procedures together with a properly completed CMR is sufficient to prove mailing (*Matter of Katz, supra*). Since in the present matter there is both evidence of general mailing procedures and a properly completed CMR, it is determined that the conciliation order in this matter was issued and

mailed to petitioner on December 15, 1995. Accordingly, the Division is entitled to the presumption of receipt of the conciliation order by petitioner.

F. Petitioner asserts that he never received written notice of the conciliation order. Having determined that the Division is entitled to the presumption of receipt based upon proof of proper mailing, petitioner cannot merely assert that he did not receive the conciliation order but must rebut the presumption with evidence. Petitioner did not submit any evidence on this issue and has therefore failed to rebut the presumption of receipt (*T.J. Gulf v. New York State Tax Commn.*, *supra*; *Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

G. The final question is whether petitioner timely filed his petition with the Division of Tax Appeals. Pursuant to Tax Law § 170(3-a)(b) and (c) and former Tax Law § 1138(a)(1), petitioner had 90 days from the mailing of the conciliation order to file a petition with the Division of Tax Appeals. Counting 90 days from December 15, 1995 results in a March 14, 1996 due date for the petition. The request was filed on June 4, 1998, over two years beyond the March 14, 1996 statutory deadline for filing the petition.

There being no timely petition, the Division of Tax Appeals is without jurisdiction to review the substantive arguments presented in the petition. (*Matter of Fresina*, Tax Appeals Tribunal, January 30, 1997; *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989.)

H. Accordingly, it is ordered that the petition of Lawrence H. Huggins is dismissed.

DATED: Troy, New York  
October 1, 1998



/s/ Roberta Moseley Nero  
ADMINISTRATIVE LAW JUDGE